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Supreme Court, U.S.
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No. 99 - 1592

In the
Supreme Court of the United States

EVANDRO S. SANTINI, *et al.*,
Petitioners,
v.
CONNECTICUT HAZARDOUS WASTE
MANAGEMENT SERVICE,
Respondent.

On Petition for Writ of *Certiorari* to the
Supreme Court of Connecticut

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIÆ*

The New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977.[1] Its membership consists of individuals, businesses, and others who believe in promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic and property rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States. NELF has regularly appeared in state and federal court, as party or counsel, in cases raising issues of general economic significance to the business community. E.g., Natsios v. National Foreign Trade Council, 181 F.3d 38 (1st Cir.), cert. granted, 120 S. Ct. 525 (1999); UNUM Life Ins. Co. v. Ward, 526 U.S. 358 (1999); BMW v. Gore, 517 U.S. 559 (1996); Reich v. Southern New England Telecommunications Corp., 121 F.3d 58 (2d Cir. 1997); Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996); Conservation Law Foundation v. Department of the Air Force, 79 F.3d 1250 (1st Cir. 1996); Preseault v. United States, 66 F.3d 1167 (Fed. Cir. 1995).

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the scope of the takings clause of the Fifth Amendment to the United States Constitution. If the decision below is allowed to

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that neither counsel for Petitioners nor Respondent authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to the preparation or submission of this brief.

stand, state courts will continue to apply different standards of review of regulatory takings under the Fifth Amendment to the United States Constitution. Moreover, under the decision below, property owners will be left without recourse to protect their reasonable investment-backed expectations when governmental "planning," rather than regulation, deprives them of the economically beneficial use of their property. These issues are of great significance to NELF's members as well as to property owners generally.

Pursuant to Supreme Court Rule 37.2, counsel for *Amicus Curiae* have secured written consent for the filing of this brief from counsel for Petitioners and Respondent.

SUMMARY OF ARGUMENT

This Court should grant the Petition and take this opportunity to direct state courts and state administrators to apply the Fifth Amendment standards articulated by this Court. The Connecticut Supreme Court failed to apply these standards when it excluded governmental actions it characterized as "mere planning" from Fifth Amendment scrutiny. Where, as here, the "mere planning" by the government results in the two-year economic idling of a fully permitted ongoing residential development, a taking within the purview of the Fifth Amendment has occurred. Moreover, where, as here, the reasonable investment-backed expectations of a property owner have been radically curtailed, just compensation is required. This Court should grant the Petition and reject the Connecticut Supreme Court's exception to the Fifth Amendment for "mere planning" activities.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO MAKE CLEAR THAT STATE COURTS AND STATE ADMINISTRATORS MUST ADHERE TO THIS COURT'S FIFTH AMENDMENT STANDARDS.

Three members of this Court recently observed that state courts, now the primary adjudicators of regulatory takings claims, see Petition at pp. 13-16, do not appear consistently willing "to hold state administrators to the Fifth Amendment standards set forth by this tribunal." Lambert v. San Francisco, 68 U.S.L.W. 3612, 3613 (Mar. 27, 2000) (No. 99-697) (Scalia, J., dissenting from the denial of *certiorari*). Indeed, as Justice Scalia noted, "[t]here is reason to believe that this may be more than a local and isolated phenomenon." Id. This phenomenon is not limited to California. See D. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan and What State and Federal Courts Are Doing About It*, 28 Stet. L. Rev. 523, 524, 551 (1999); R. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?* 6 Fordham Envtl. L.J. 523, 555 (1995); Petition at pp. 24-28. As the Petitioners demonstrate, see Petition at pp. 19-22, the Connecticut Supreme Court has, in this case, also failed to follow this Court's regulatory takings jurisprudence by holding, as a matter of law, that governmental action which is undertaken as part of a planning process cannot form the basis of a temporary regulatory takings claim. This Court should grant the Petition to make clear that state courts are required to adhere to this Court's Fifth Amendment standards when adjudicating all takings claims.

II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE EXTENT TO WHICH, IF ANY, GOVERNMENTAL PLANNING IS IMMUNE FROM SCRUTINY UNDER THE FIFTH AMENDMENT.

This Court should grant the Petition for another important reason as well: To clarify the extent to which, if any, governmental action that is characterized or denominated as "planning" is immune from analysis under the Takings Clause.

Under this Court's regulatory takings jurisprudence, a taking occurs "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). This rule applies to temporary takings accomplished by governmental regulation, even when the regulation is subsequently rescinded. Id. at 1031 n.17; see also First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 321 (1987). Santini demonstrated at trial that, as a result designation of his property as one of three potential sites for a hazardous waste dump, he "was unable to proceed with residential development, and thus obtain funds from sales to pay down [his] debts . . . ." Petition Appendix ("Pet. App.") at 44a.

The Connecticut Supreme Court, however, immunized the designation of the Santini property as a potential hazardous waste site from scrutiny under the Takings Clause because it held that the designation was "mere" governmental planning. Pet. App. 17a. The court further held that, unless and until the Connecticut Hazardous

Waste Management Service (the "Service") reached a "fixed and irreversible" intent to take Santini's property by eminent domain, there could be no taking notwithstanding that Santini was deprived of the economically beneficial use of his property in the meantime. Id. at 26a-27a. The court concluded that the Service did not have the requisite intent because Santini's property was but one of three potential sites and further study and permits were required before the final selection was made. Id. at 26a. The court regarded the economic idling of the development for two years as simply an incident of ownership that was not compensable. Id. at 23a. The court cited First English, 482 U.S. 304, in support of its holding.[2] Id. The court further held that this Court's other regulatory and temporary takings decisions[3] were not pertinent to its analysis because those cases did not involve "mere planning" by the government. Pet. App. 24a.

The two dissenting justices rejected the "mere planning" rationale. They noted that "houses and radioactive wastes do not mix," id. at 31a, and that it is "inconceivable that a 'Chernobyl Estates' could be a successful real estate development in Connecticut." Id. at 38a. These justices would have held, relying on this Court's temporary and

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2. "Indeed, in *First English Evangelical Lutheran Church*, the court reiterated 'the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and . . . *depreciation in value of the property by reason of preliminary activity is not chargeable to the government.*'" Pet. App. 23a (emphasis in original).

3. Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); and Penn Central Transportation Co. v. New York City, 438 U. S. 104 (1978).

regulatory takings decisions, that

> when, because of the impact on their distinct investment backed expectations, property owners like the plaintiffs are forced to sacrifice all economically beneficial uses of their property, even temporarily, a taking that requires just compensation has occurred.

Id. (MacDonald, J., dissenting); Id. at 32a (Berdon, J., dissenting).

As noted above, the majority and dissenting justices all found support for their positions in decisions of this Court. The majority likened the effect of the hazardous waste designation to an incident of ownership that is subject to alteration without compensation. Pet. App. 23a. This Court has recognized in cases in which the federal government took property by eminent domain, that "[a] reduction or increase in the value of property [that] may occur by reason of legislation for or the beginning or completion of a project" are "incidents of ownership" and are not considered "a 'taking' in a constitutional sense." Danforth v. U. S., 308 U.S. 271, 285 (1939). See also Kirby Forest Industries, Inc. v. U.S., 467 U.S. 1, 15-16 (1984). The majority applied this logic to the hazardous waste site designation.

This Court, however, has also

> frequently recognized that *a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the*

> *meaning of the Fifth Amendment*, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.

Kirby Forest, 467 U.S. at 14 (emphasis added). In addition, "a land-use regulation that severely interfered with an owner's 'distinct investment-based expectations' might precipitate a taking." Id. See Lucas, 505 U.S. at 1015-1019. This is so because

> while most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the "'advantage of living and doing business in a civilized community,'" some are so substantial and unforeseeable, and can so easily be identified and redistributed, that "justice and fairness" require that they be borne by the public as a whole.

Kirby Forest, 467 U.S. at 14 (citations omitted). The dissenting justices considered the effect of the Service's designation under this analysis.

Amicus submits that it is difficult to see how being designated a potential hazardous waste site through a secret planning process, with the consequent two-year economic idling of a fully permitted ongoing residential development, is a mere "incident of ownership" that the Constitution does not protect. The designation of Santini's development, in which he had already invested millions of dollars, constituted a "radical curtailment of [his] freedom to make

use of or [his] ability to derive income from his land." Kirby Forest, 467 U.S. at 14. The designation, like the regulation at issue in Lucas, put an abrupt end to Santini's reasonable investment-backed expectations. See Lucas, 505 U.S. at 1008.

As this Court has repeatedly recognized:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," . . . , this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-124 (1978) (alteration in original; citations omitted). While the Connecticut Supreme Court has not developed a "set formula" for what constitutes a taking, it has determined that governmental activities that are characterized as "mere planning" are not subject to a Fifth Amendment takings analysis regardless of the impact those activities have on individual property owners. This exclusion of a wide-range of governmental action from

scrutiny would allow creative land use planners and other governmental officials to recast as "planning measures" many regulations and ordinances that would otherwise be subject to the Fifth Amendment.[4] This Court should grant the Petition and reject this categorical exclusion of "mere planning" from Constitutional scrutiny.

CONCLUSION

For the foregoing reasons, and those set forth in Santini's Petition, this Court should grant the Petition.

Respectfully submitted,

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4. For example, the "Beachfront Management Act" which prohibited Lucas from building a single-family home could easily be transformed into the "Sand Dunes Planning Initiative." See Lucas, 505 U.S. at 1007-09. Similarly, the interim flood protection ordinance at issue in First English, 482 U.S. at 307, which could itself have been viewed as a planning device, might be recast as the "Flood Protection Study and Building Moratorium."